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IN THE

Supreme Court of the United States

October Term, 1945.

No. 189

Laurence M. Williams, as Liquidator of Sterling Sugars, Inc., formerly a Louisiana Corporation, and, Sterling Sugars Sales Corp., *Petitioners,*

v.

Commissioner of Internal Revenue, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

LAURENCE M. WILLIAMS, as Liquidator of STERLING SUGARS, INC., formerly a Louisiana Corporation, and, STERLING SUGARS SALES CORP., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Laurence M. Williams, is the Liquidator of Sterling Sugars, Inc., a Louisiana corporation, and Sterling Sugar Sales Corporation, is a Louisiana corporation. They respectfully pray that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the aforesaid cause. That Court's opinion was rendered on February 14, 1946, and a petition for rehearing was denied on March 15, 1946.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1935 (U. S. C. A., Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906(g) printed in the Appendix hereto.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Laurence M. Williams is the Liquidator of Sterling Sugars, Inc. and is herein for convenience called Williams. Sterling Sugars, Inc. was a grower and processor of sugarcane and a refiner of raw sugar and during the period from June 8, 1934, through October 31, 1935, paid processing taxes totaling $652,424.05 under the Agricultural Adjustment Act of 1933 as amended. Sterling Sugars Sales Corp. was selling agent for Sterling Sugars, Inc. Of this sum it is seeking to recover $651,825.27. Several claims for refund of these taxes were filed pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue disallowed the final claim in full. Thereupon, Williams and the Sales Corporation filed petitions for a hearing on the merits with the United States Processing Tax Board of Review. That Board heard the cause but thereafter and before decision the cause was transferred to the Tax Court of the United States on December 31, 1942, as provided by statute (56 Stat. 957, 967).

The Tax Court made findings of fact of an unfavorable margin, a price increase on June 8, 1934, and some letters, etc., indicating that the taxpayer believed it had passed the tax on, or intended to do so. It appeared to be controlled by the finding that:

> "The Processing Corporation, together with other producers of sugar, increased on this date its prices to customers by the amount of 55 cents per 100 pounds and the fluctuation of sugar prices on the market after that date was from the higher level." (R. 86, 87)

The remaining findings were directed towards the end of supporting the foregoing finding. The decision, adverse to the petitioner was rendered September 20, 1943 (R. 90).

Thereafter the petitioner filed a motion for amendment of the findings and reconsideration of the cause, directing the Court's attention to the fact that the margins had been erroneously computed and were in fact favorable to the petitioner, and, that there was a mass of evidence regarding price movements with respect to which the Court had made no findings; also, that the price rise of June 8, 1934 was not in fact a rise and that such rise was not maintained. (R. 91 to 130). The said motion was denied on October 25, 1943. (R. 131-132).

Twenty months later this Court in another sugar case, *Webre Steib Co. Ltd.,* (324 U. S. 164, 174), held that the very same price increase was not conclusive of a tax shift, indicating for the Tax Court's guidance on remand that it should consider how far the petitioner had succeeded in its effort to pass the tax on, and that the price may not have responded continuously to the effort to shift the tax. As a further guide of the type of evidence that will determine a tax shift this Court cited *Johnson, AAA Refunds: A Study in Tax Incidence* (1937) (37 Col. L. Rev. 910) (R. 344-356). The said cited authority holds that in considering a tax shift all the economic factors that affect price must be considered and weighed. The pertinent part of that article appears in the record (R. 344-356).

After this Court spoke in *Webre Steib Co. Ltd.* (supra) the Tax Court had occasion to meet the same fact in another Louisiana sugar case, *South Coast Corporation* v. *Com.* (T. C. Memo. Docket No. 2165, decided June 11, 1945), and, in deciding for the taxpayer in an opinion written by the same Judge (Leech) who wrote the opinion in the case at bar, referred to the same price increase and stated:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

This Court, also held in *Webre Steib* (supra) that the margin could be rebutted pro tanto (324 U. S. 171); and, assuming the margin was adverse, the Tax Court failed to evaluate the margin rebuttal evidence.

It is obvious that the Court and particularly Judge Leech had changed his mind respecting the importance of the June 8, 1934 price rise, and that it did not stand alone but must be considered in the light of what causes price changes.

In the case at bar the Tax Court had evidence of the type advocated in the *Johnson* article, and in the motion to amend the findings the Court's attention was directed thereto; however, it thought them not controlling (R. 132). The taxpayer adduced, but the Court failed to make findings with respect to the following lines of evidence, to wit:

(a) That immediately preceding the price rise of June 8, 1934 the market declined the equivalent of the tax in an effort to get rid of sugar (R. 170-171).

(b) That there were no sales of sugar for some time after the price rise of June 8, 1934 (R. 178).

(c) That the petitioner does not initiate any sales prices. It sells at a set discount from the standard price of competitors (R. 158). It always followed the large refiners in price changes up or down (R. 159).

(d) After the invalidation of the tax the price of refined sugar was higher than when it was subject to a tax (R. 171).

(e) The taxpayer tried to do everything its competitors were doing and patterned itself after its competitors (R. 189).

(f) Evidence of the price changes and its causes were adduced beginning with early spring 1933 (R. 95-101).

(g) The Court found the Cost of Commodity for the margin computation to be $3,963,006.03 for the tax period (R. 84) and $7,156,004.66 for the base period (R. 84). A

composition of such figures (R. 102) clearly shows that the cost of commodity has not been computed as required by Section 907(b)(5) Revenue Act of 1936 (49 Stat. 1751).

(h) Seven factors other than the tax were advanced by the taxpayer in rebuttal of the margin (R. 112-121) but no findings were made with respect thereto.

In addition, the respondent, in fact the United States Government, through its Secretary of Agriculture on March 15, 1937 in a Press Release analyzing the effect of a tax on sugar stated:

> "Thus it will be noted that the quantity of supply, and not the cost of production, is the direct causal factor in determining price; and factors other than cost of production—in this case quotas—can supersede cost of production in determining supply, and hence in determining price."

The foregoing evidence and the subsequent action of the Tax Court in *South Coast Corp.* v. *Com.* (supra) would appear to make it clear that the Tax Court decided the case at bar under a misconception of the law; and, that it would have decided the case at bar differently had this Court's decision in *Webre Steib Co. Ltd.* (supra) construing the law preceded rather than followed the decision in the instant case.

Your petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit and that Court affirmed on the same group of facts deemed controlling by the Tax Court (R. 335-337); ignoring the rationale of this Court's construction in *Webre Steib* (supra).

We contend that the function of the Circuit Court was not to determine whether there was substantial evidence to support the conclusion of the Tax Court. The function of the Circuit Court was to examine the findings of fact and decide whether or not the Tax Court had reached its conclusion by weighing the facts according to the rule of law laid down by this Court. Obviously it had not. Hence from petitioners' viewpoint these are the

QUESTIONS PRESENTED.

1. Is the rule of law reestablished by this Court in *Dobson v. Com.* (320 U. S. 489)—whereby the function of the reviewing Court is limited to an ascertainment of whether there is a rational basis for the conclusions approved by the Tax Court and denying it the right to weigh all the evidence —applicable when this Court subsequent to the decision of the Tax Court construes the statute in a manner requiring the weighing of evidence more embracing than that weighed by the Tax Court in reaching its conclusion?

2. Where the Tax Court rests its decision on a single fact which it considers controlling and makes findings collateral to that fact—ignoring all the balance of the evidence—and then loses jurisdiction before this Court in another cause construes the applicable law in a manner requiring the weighing of the ignored evidence, will this Court grant certiorari to determine whether such decision is in accordance with law as this Court has subsequently construed the law?

3. Did the Tax Court err in finding that following the increase of 55 cents "the fluctuation of sugar prices on the market after that date was from the higher level thus set" (R. 87); when there is not a shred of evidence in support of such a finding?

4. Did the Tax Court err in failing to weigh the margin rebuttal evidence adduced by the taxpayer in order to determine the "actual extent" of the tax burden borne or shifted as required by Section 907(e) of the Revenue Act of 1936 (49 Stat. 1752)? This question is of particular importance due to the erroneous theory applied by the Tax Court in deciding the case.

REASONS FOR GRANTING THE WRIT.

1.

Only this Court, by granting the writ, can correct the gross miscarriage of justice that will otherwise result from

the Tax Court's erroneous construction of the law prior to this Court's decision in *Webre Steib Co. Ltd.* (supra). The evidence has been adduced, but the Tax Court ignored all of such evidence in deciding the case.

Unless certiorari is granted we have the anomalous situation of your petitioner being denied justice and its competitors *Webre Steib Co. Ltd.*, *South Coast Corp.*, and *Insular Sugar Refining Co.* (141 F. (2d) 713) being granted justice —even though the same single fact applies to all—simply because the Tax Court erroneously construed the law.

2.

The Circuit Court of Appeals, by applying the rule of law, reestablished by this Court in *Dobson* v. *Com.* (supra), instead of recognizing the exception resulting from an intervening decision by this Court, has perpetuated the error of the Tax Court, and this taxpayer cannot procure justice unless this Court grants certiorari and upon remand directs the lower Court to weigh all the evidence and findings of fact.

3.

Rule 38, paragraph (5)(b) of the rules of this Court sets forth as one of the reasons this Court in its exercise of sound judicial discretion, may grant certiorari is where a Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court. We think that the Circuit Court by confining itself to the *Dobson* rule has decided the case at bar in conflict with the decision of this Court in *Webre Steib Co. Ltd.* insofar as that case decides the type of evidence to be weighed.

4.

Certiorari is being applied for in two other sugar cases, *Realty Operators, Inc.* and *William Henderson* (Partnership). All three cases were decided by the Tax Court on the same narrow fact before this Court decided *Webre*

Steib. All three cases were consolidated for argument before the Fifth Circuit. The Fifth Circuit affirmed all three cases without testing them by the rule laid down by this Court in *Webre Steib*. The granting of certiorari and subsequent remand is the only means by which a flagrant miscarriage of justice can be avoided.

5.

Counsel for your petitioners successfully represented *Webre Steib* before this Court; and represents *Realty Operators, Inc.* and *William Henderson* in the petitions they have filed this day. Counsel assures this Court that the evidence this Court believed lacking but necessary to a sound decision in *Webre Steib* is contained in the record in the instant cases in abundance; so that, if the Tax Court is given an opportunity to weigh such evidence we believe that the ends of justice will be served.

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IN THE

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No.

LAURENCE M. WILLIAMS, as Liquidator of STERLING SUGARS, INC., formerly a Louisiana Corporation, and, STERLING SUGARS SALES CORP., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In applying for a writ of certiorari in this case and the companion cases filed this day we have a most unusual situation that only this Court can correct. The Tax Court decided these cases on the theory that the price rise in the sugar industry on the day the tax went into effect was conclusive in deciding the issue. The record discloses a substantial volume of evidence not bearing on the grounds ultimately relied on by that Court; but, nevertheless of sufficient scope so that the record shows the taxpayer adduced substantial evidence in conformity with this Court's hold-

ing of the type of evidence necessary to correctly decide the issue. True, the taxpayer has had its hearing on the merits, and the remand here sought is not for the purpose of retrying the case, the evidence has been adduced and the taxpayer is prepared—if need be—to rely upon the record made. The purpose of the writ is to permit the Tax Court to weigh all the evidence to the end and purpose that the test directed by this Court in *Webre Steib* (supra) may be applied.

This Court in deciding *Webre Steib* held that the price rise on June 8, 1934 was not conclusive; that the test was how far the taxpayer succeeded in its effort to pass the tax on; and, that the price may not have responded continuously to the effort to shift the tax (324 U. S. 174). As indication of the type of evidence needed this Court cited *Johnson's* article in the Columbia Law Review and we have reproduced in the record from that article the entire chapter dealing with price factors (R. 344-356).

By the time this Court decided *Webre Steib* the Tax Court had lost jurisdiction of the case because an appeal had been filed with the Fifth Circuit Court of Appeals. No relief therefore was possible from the Tax Court, although that Court in a subsequent sugar case, in an opinion by the same Judge (Leech) who wrote the opinion in the case at bar attached little significance to the June 8, 1934 price rise stating:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

The Fifth Circuit Court of Appeals heard the case at bar and the companion cases filed this day in a consolidated argument, and we respectfully suggest that upon certiorari being granted one consolidated argument be held before this Court.

The Circuit Court's attention was directed to the decision of this Court in *Webre Steib* but it apparently was im-

pressed by the argument of the Government that under the theory of *Dobson* v. *Com.* (320 U. S. 489) its function on review was limited to ascertaining whether there was substantial evidence to support the Tax Court's conclusion. This is all that the Circuit Court did, affirming on the same group of facts deemed controlling by the Tax Court instead of testing the Tax Court's conclusion to determine whether it was in accordance with law—in accordance with law as this Court construed the law after the decision by the Tax Court.

We cannot agree that upon the rendering of a decision by this Court subsequent to a decision by the Tax Court that the Circuit Court is limited in its review. Instead we think it must test the record to determine whether the decision is in accordance with law—in accordance with the law as construed by this Court, not as the Tax Court thought it to be. Therefore, the

SPECIFICATIONS OF ERROR TO BE URGED.

are that the Circuit Court of Appeals erred:

1. In limiting its review to a determination of whether there was a substantial basis in the evidence for the conclusion reached by the tax Court. (R. 377)

2. In failing to review the findings of fact made by the Tax Court in order to determine whether the conclusion reached from all the evidence was in harmony with the principles pronounced by this Court in a later decision.

3. By failing to find as a matter of law that the decision of the Tax Court was not in accordance with law.

4. In failing to find that the Tax Court committed reversible error in holding that the price increase once made, a fortiori, "the fluctuation of sugar prices on the market after that date was from the higher level thus set" (R. 87); whereas, there is not a scintilla of evidence in support of such logic.

5. In failing to remand the cause to the Tax Court with instruction to determine the "actual extent" to which the seven factors other than the tax adduced by the taxpayer (R. 112), pro tanto rebutted the presumption resulting from the margin computation, as provided by Section 907(e) of the Revenue Act of 1936 (49 Stat. 1752) and construed by this Court in *Webre Steib* (324 U. S. 164, 171).

6. In failing to remand the cause to the Tax Court with instructions to determine the margin presumption by determining the Cost of Commodity in accordance with Section 907(b)(5) of the Revenue Act of 1936 (49 Stat. 1751).

ARGUMENT.

Scope of Review.

This Court in *Dobson* v. *Com.* (320 U. S. 489, 501) had occasion to remind the Courts that the function of a reviewing Court in tax cases coming up from the Tax Court was, under the law, limited to ascertaining whether there is found to be a rational basis for the conclusions reached by that Court, but was careful to qualify that rule of law to the extent that the decison must have warrant in the record and a reasonable basis in the law. In *Webre Steib* (supra) this Court said: (324 U. S. 173)

> "We must determine whether there is evidence which is legally sufficient for administrative action, but we may not weigh it."

and in *Com.* v. *Scottish American Inv. Co.* (323 U. S. 119, 124) this Court said:

> "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court."

We consider that good law—in any event, it is the law of the land—but we cannot lose sight of the fact that the decision of the Tax Court must be in accordance with law. Under circumstances such as those here present—that is when the Tax Court construes a law with no other guide than its own interpretation, and this Court subsequently construes the law in a manner that is clearly at variance with the construction of the Tax Court—then, it is the function of the reviewing Court to examine all the evidence and determine whether the construction of the Tax Court is according to law, as such law is construed by this Court.

That the Circuit Court did not do. The Tax Court's original interpretation is not reconcilable with the law as laid down by this Court. This is evident from the fact that the Tax Court treated the same piece of evidence differently in *South Coast Corp.* v. *Com.* (T. C. Memo. Docket No. 2165, decided June 11, 1945) after it had the benefit of a construction by this Court in *Webre Steib* (supra).

Despite the limitations placed upon the Circuit Courts if the decision of the Tax Court is in accordance with law, no such limitation applies if the decision is not in accordance with law. Where, as here, the decision is clearly not in accordance with law as this Court has construed the law, the Circuit Court should have remanded the case for a weighing of the evidence in the light of the law as it was determined by this Court.

Since the Circuit Court did not perform its proper function, your petitioner must rely upon the grace of this Court to remedy a wrong that otherwise will be beyond correction.

The Decision is Not in Accordance with Law.

Prior to the decision of this Court in *Webre Steib* (supra) there was no guidepost for the Tax Court to follow other than its own construction of what evidence would demonstrate where the burden of the tax fell.

In *Webre Steib* this Court made it clear that the intention of the taxpayer was not controlling, nor was his belief

that he had accomplished a shift. The test is, was a shift accomplished. Failure of success in the effort to shift the tax was important; likewise, the price may not have responded continuously to the effort to shift the tax (324 U. S. 174). *Johnson's* article in the Columbia Law Review (R. 344-356) was cited as the kind of evidence that would demonstrate where the burden of the tax fell.

Johnson in his article develops the full economics of what causes price changes—competition, marginal producers, elasticity of demand, etc. He begins Chapter IV (R. 344) with the statement that:

> "A tax on group production or on gross sales is shifted by the taxpayer to the extent that *the tax causes the price* of the product to be increased and the costs of production to be decreased. Since, then, tax incidence is a problem of price analysis, it can be explained only in terms of the factors which determine price." (Italics supplied)

The Secretary of Agriculture in advocating the reimposition of the tax in a Press Release dated March 15, 1937, likewise approaches the problem of tax impact by an analysis of price factors and in substantiation of his conclusions makes the following observation:

> "Perhaps it should be noted that although there was a tax of one-half cent per pound of sugar during 1935 and no tax during 1936 the difference in the price paid by consumers in the two years was only one-tenth cent."

The Secretary further finds that:

> "Thus it will be noted that the quantity of supply, and not the cost of production, is the direct causal factor in determining price; and factors other than cost of production—in this case *quotas—can supersede* cost of production in determining supply, *and hence in determining price.*" (Italics supplied)

Surely, a decision based on such false logic—that once a price rise takes place "the fluctuations of sugar prices

on the market after that date was from the higher level thus set'' (R. 87)—cannot be in accordance with law. Lacking a single shred of evidence to support such a conclusion cannot be in accordance with law. The same Tax Court Judge changed his mind about the conclusiveness of the June 8, 1934, price rise and the implications that follow—after this Court pointed the way—in *South Coast Corp.* v. *Com.* (supra). However, there is but one way in which the injustice in the case at bar can be corrected and that is for this Court to grant certiorari. Obviously a federal question has been decided in a way probably in conflict with an applicable decision of this Court (Rule 38 (5) (b)).

Actual Extent of the Burden of the Tax Borne.

The decision of the Tax Court, affirmed by the Circuit Court on the same grounds, rested on the price rise of June 8, 1934, and the unwarranted logic that subsequent fluctuations were from the higher level thus set. Both the major and minor premise have been demonstrated to be wrong. Consequently it leaves the record in a position where the Court has found an unfavorable margin—although the margin is in fact favorable—and has failed to evaluate the rebuttal evidence adduced by the taxpayer (R. 112), nor has the Court made findings of the factors that in fact caused price changes.

The factors causing price changes affect the industry and all in it alike. In *Realty Operators, Inc.* (certiorari application filed this day) the Court made voluminous findings with regard to the factors that caused price changes. In *William Henderson* (certiorari application filed this day) it was stipulated that the quota system directly affected the price of the raw sugar. It is therefore evident upon remand the Tax Court can from the record and its conclusions in the companion cases do justice—justice as it has administered it in a subsequent case, *South Coast Corp.* (supra) after this Court showed the way in *Webre Steib* (supra).

Conclusion.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that this petition for writ of certiorari be granted.

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APPENDIX.

Sec. 906 (g) Rev. Act of 1936 as amended (56 Stat. 969)

Section 510 (j) of Revenue Act of 1942: (56 Stat. 969)

* * * * * * * * * *

(j) Section 906 (g) (relating to appeals) is amended to read as follows:

"(g) A decision of the Board rendered after January 1, 1942, may be reviewed by a circuit court of appeals or the United States Court of Appeals for the District of Columbia, if a petition for such review is filed by either the claimant or the Commissioner within three months after the decision is rendered. Such decision may be reviewed by the circuit court of appeals for the circuit in which the claimant resides, or has his principal place of business, or, if none, by the United States Court of Appeals for the District of Columbia: *Provided, however,* that in any event such decision may be reviewed by any circuit court of appeals or the United States Court of Appeals for the District of Columbia which may be designated by the Commissioner and the claimant by stipulation in writing. Such courts shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing as justice may require. The judgments of such courts shall be final, subject to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code as amended. Such courts are authorized to adopt rules for the filing of petitions for review, preparation of the record for review, and the conduct of the proceedings on review. A decision of the Board rendered after January 1, 1943 shall become final in the same manner that decisions of the Board become final under section 1140 of the Internal Revenue Code."

Sec. 907 (e) Rev. Act of 1936 (49 Stat. 1752).

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and

after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

Section 907 (b) (5) Revenue Act of 1936 (49 Stat. 1751)

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITIONERS' BRIEF IN REPLY

to Respondent's Brief in opposition to Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS.

IN THE

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PETITIONERS' BRIEF IN REPLY

to Respondent's Brief in opposition to Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent in opposing the separate petitions for certiorari filed by the respective petitioners in the above causes has filed a single brief in opposition. So that our reply may conform to the practice adopted by the respondent, we file this single brief in reply.

BASIS FOR REPLY.

The brief of the respondent in opposition to the petitions for writs of certiorari in these causes is not responsive—that in a word sums up the confusion occasioned by the respondent's brief. It is our purpose to demonstrate that it is not responsive and that nothing contained therein can aid the Court in resolving the questions presented by the petitioners.

ARGUMENT.

Questions Presented.

The questions presented in the three petitions appear on page 6 of the respective petitions; and, in a consolidated form are:

> 1. Is the rule of law reestablished by this Court in *Dobson* v. *Com.* (320 U. S. 489)—whereby the function of the reviewing Court is limited to an ascertainment of whether there is a rational basis for the conclusions approved by the Tax Court and denying it the right to weigh all the evidence—applicable when this Court subsequent to the decision of the Tax Court construes the statute in a manner requiring the weighing of evidence more embracing than that weighed by the Tax Court in reaching its conclusions? (All three cases)
>
> 2. Where the Tax Court has decided a cause on a single finding of fact—ignoring all its other findings of fact—and then loses jurisdiction before this Court in another cause construes the applicable law in a manner requiring the weighing of the ignored findings of fact, will this Court grant certiorari to determine whether such decision is in accordance with law as this Court has subsequently construed the law? (All three cases.)

3. Was it error for the Tax Court to rest its decision on the *adoption of a policy* of passing the tax on to its vendees by an increase in the sale price of sugar (Henderson R. 33); instead of weighing the evidence to determine how far petitioner succeeded in passing on the tax (*Webre Steib*, 324 U. S. 174); and, did the Court err in failing to take cognizance of its finding of fact that the price did not respond continuously to the effort to shift the tax? (Henderson R. 32, 33; *Webre Steib*, 324 U. S. 174). (Henderson Petition.)

4. Did the Tax Court err in finding that following the increase of 55 cents "the fluctuation of sugar prices on the market after that date was from the higher level thus set" (Williams R. 87); when there is not a shred of evidence in support of such a finding? (Williams Petition.)

5. Did the Tax Court err in failing to weigh the margin rebuttal evidence adduced by the taxpayer in order to determine the "actual extent" of the tax burden borne or shifted as required by Section 907 (e) of the Revenue Act of 1936 (49 Stat. 1752)? This question is of particular importance due to the erroneous theory applied by the Tax Court in deciding the case. (Williams Petition.)

The respondent does not meet the issues raised in the above five questions—instead he presents one question which reads (Res. Br. 3):

> "Whether, in any of these cases, the Tax Court erred in holding that the taxpayers, each claiming refund under Title VII of the Revenue Act of 1936 of processing tax payments, failed to establish that they bore the ultimate burden of the tax."

We submit that the question posed by the respondent cannot be determinative of whether or not the writs should

issue—that question can only be answered by the Tax Court after this Court has remanded the causes with directions to weigh the evidence and apply the rule of law laid down by this Court in *Webre Steib Co. Ltd.* v. *Com.* (324 U. S. 164). It is the province of the Tax Court to weigh the evidence. When as is the case here, the correct construction of the law has been determined by this Court subsequent to the decision of the Tax Court; then, any preceding decision of the Tax Court not based upon the law as later construed by this Court is not in accordance with law and can only be corrected by remand for the weighing of the evidence material to such construction.

The first step in hat direction is the granting of the writs of certiorari.

The Facts Advanced by the Respondent.

The respondent in his brief sets forth the following group of facts in support of his contention that the Tax Court correctly decided the cases (pages 5 to 13):

(a) The margin computation in each case;

(b) That the price of refined sugar was advanced on June 8, 1934;

(c) That the quota system of quantity control of sugar established by the Sugar Amendment to the Agricultural Adjustment Act which went into effect on June 8, 1934—the date of the advance in the price of sugar—resulted in a direct increase in the price of raw sugar (Res. Br. 8) and made it possible for the sugar industry to make some increase in the price of sugar on and after June 8, 1934 (Res. Br. 7);

(d) Records and letters of some of the petitioners:

From the foregoing set of facts the respondent concludes that there was substantial evidence sufficient to sustain the decisions of the Tax Court—entirely ignoring our contention that the Tax Court proceeded upon an erroneous con-

ception of the law and the Circuit Court failed to apply the law as pronounced by this Court.

With the respondent's theory we cannot agree. First, because the decisions are not in accordance with law—the law as this Court expounded it in *Webre Steib Co. Ltd.* v. *Com.* (*supra*). Secondly, because the above collective facts do not warrant decisions adverse to the petitioner. And, last, because the Tax Court did not decide the cases on the collective facts advanced by the respondent. To the extent that the Tax Court did rely on some of the aforesaid facts, it proceeded under an erroneous construction of the law—it therefore became the duty of the Circuit Court to remand or itself examine all the evidence. The Circuit Court could do this because in addition to the printed record in each case the exhibits introduced in evidence were physically delivered to the Circuit Court as part of the Record. (Realty R. 120; Henderson R. 158, 159; Williams R. 287)

(a) *The margin computations:* In none of the cases did the Tax Court rely upon the margin computation, nor the taxpayers accounting for the spread in margin as provided by Section 907(e)(1). In *Webre Steib* (*supra*) this Court referring to this provision of law said (p. 171):

> "The statute declares, however, that the presumption may be rebutted by proof of 'the actual extent' to which the burden of the tax was shifted. This language appears to mean that the presumption may be rebutted pro tanto, and not necessarily all at once or not at all. Thus it does not cease to operate on introduction of evidence merely sufficient to support a finding that some of the tax was shifted. It must be evidence sufficient to support a finding that the entire tax shifted. Short of that, the presumption is not eliminated but only diminished to the extent that the rebuttal evidence will support a contradictory finding. See E. Regensburg & Sons v. Helvering, 2 Cir. 130 F. (2d) 507, 509."

The reasoning of the Tax Court in *Realty Operators, Inc.* is so far afield from the rule of law pronounced above that it is apparent that its conclusion of law is not in accordance with law. In *Realty Operators, Inc.* the Tax Court made two different margin findings. It made a finding favorable to the taxpayer to the extent of 11.4 cents per hundred pounds (Realty R. 32) indicating a 23 percent absorption. It also made an unfavorable finding based upon different factors and the respondent seizes upon such unfavorable margin to unequivocately declare that the margins are all adverse to the taxpayers (Res. Br. 14, 15). The factors accounting for the difference between the two margins are caused by the different methods employed in computing cost—the favorable margin uses actual cost (Realty R. 32) and the unfavorable margin uses market value of cane (Realty R. 32). Is there a person so bold as to seriously contend that a theoretical market price of cane below the actual cost of such cane can result in a tax shift? It is the actual cost that has come out of the till of the taxpayer—not the market price at the time the cane is severed and transported to the factory. How can an actual cost expended result in a tax shift? Obviously, the unfavorable margin must first be corrected by the factor of the excess of actual cost of cane over market value; and when that is done the unfavorable margin is diminished and is in accord with the favorable margin—so that in fact there is but one margin and that is a favorable margin for the taxpayer.

In each case the taxpayer presented and in some cases the Tax Court made findings with respect to the taxpayers' accounting for the spread in margins (Realty R. 39, 40; Henderson 28-33; Williams R. 106-130). The presumption, as we understand it, is not a fixed factor. It is a fluctuating factor adjusted "pro tanto" by the various factors established other than the tax. If it can be diminished by correction it seems to us it can by the same methods by converted from an unfavorable margin to a favorable margin.

If the presumption can be diminished without losing its character as a presumption; then, logically, it remains a presumption—perhaps favorable, instead of unfavorable—if the factor that diminishes it is of sufficient magnitude to wipe out the unfavorable computation and result in a favorable computation.

The Tax Court made margin findings but did not weigh the rebuttal or accounting for the spread in margins. Its decisions therefore are not in accordance with law.

Instead of weighing the rebuttal or accounting for the spread in margins the Tax Court considered the price rise of June 8, 1934—even though *Realty* had no sugar to sell for some months before and after such date—conclusive.

The miscarriage of justice inherent in the cases at bar is emphasized by the subsequent conclusions of the Tax Court in another case. In *South Coast Corporation* (T. C. Memo Docket No. 2165 decided June 11, 1945)—another sugar case decided by the Tax Court after this Court pronounced the law—the Tax Court did not disregard the margins because the price advanced on June 8th; it followed the holding of this Court in *Webre Steib* (*supra*) and stated:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

Such are the words of Judge Leech—the same Judge who decided the case of one of your petitioners (*Laurence M. Williams*) adversely on the identical price rise. In the *South Coast* case he had the benefit of the pronouncements of this Court in *Webre Steib*—in the cases at bar neither Judge Leech nor the other Judges had the benefit of such pronouncements.

(b) *The price of refined sugar was advanced on June 8, 1934.* This incident was considered controlling under the law by the Tax Court in all three cases. This Court in *Webre Steib* (*supra*) page 174 did not hold the advance in

price of sugar on June 8, 1934 conclusive. It held that the margins were some evidence that the price "may not have responded continuously" to the effort to shift the tax. It indicated by citing Johnson that the cause of the price rise and its continuance were to be taken into account.

Here the Tax Court failed to test the cause or continuance of the effort to raise the price. More than that, it acknowledges in the line of proof captioned (c) above that the quota system of control directly caused an increase in the price of raw sugar (Henderson R. 30) and made possible an increase in the price of refined sugar on and after June 8, 1934 (Realty R. 40). Furthermore, the Tax Court found as a fact that Realty Operators had no sugar on hand to sell on June 8, 1934, the 1933 crop having been sold, and the 1934 crop not yet ready for harvest (Realty R. 32). The crop is harvested beginning in October (Realty R. 25).

It becomes evident therefore that a decision resting on an advance in price can only be in accordance with law if the advance was caused by the tax and if the price continued to respond to the effort to pass the tax on. If the price did not respond in full the question is to what degree, if at all, did the price respond to the effort to pass the tax on. In view of the finding in *Realty Operators, Inc.* (R. 32) that:

> "At this time (June 8, 1934) petitioner had no sugar on hand, the 1933 crop having been sold, and the 1934 crop not yet ready for harvest."

a finding that the claimant raised prices four months before the harvest (Realty R. 32) is obviously in error, and a fortiori, a decision on such wrong finding is not in accordance with law.

Realty Operators is a glaring example of the miscarriage of justice perpetrated by the Tax Court and continued by the Circuit Court; but, it only brings into bold relief the error committed by the Tax Court in all three cases at bar.

(c) *The quota system of control.* The Sugar Amendment to the Agricultural Adjustment Act lodged in the Secretary of Agriculture control of the quantity of production of sugar and its importation. Such control became effective June 8, 1934, the same date that the price of refined sugar became effective. Under the quota system the Secretary could raise or lower the quantity of sugar available for marketing.

Among the facts advanced by the respondent as substantial evidence in accordance with law is the finding of the Tax Court that the quota system caused a direct increase in the price of raw sugar (Res. Br. 8) and made it possible for the sugar industry to make some increase in the price of sugar on and after June 8, 1934 (Res. Br. 7).

These findings do not sustain the Tax Court's decisions that the price rise of June 8, 1934 was a passing on of the tax. They are in direct conflict with such decisions and establish beyond the shadow of a doubt that the decisions of the Tax Court are *not* based on substantial evidence and in accordance with law. It was within the province of the Circuit Court to remand on such conflicting findings; however, feeling itself restricted by the rule of law reestablished in *Dobson* v. *Com.* (320 U. S. 489) it failed to do so. This was error as obviously if the quota system caused the price increase, in whole or in part; at least, to such extent the increased price did not reflect a passing on of the tax.

(d) The respondent advances various letters and documents of the taxpayers in support of his position that the decisions of the Tax Court are correct. They are the type of evidence permitted by Section 907(e)(2) of the Act; however, the act further provides in the same section:

> "but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times."

Although the taxpayers submitted evidence explaining each item neither the Tax Court, the Circuit Court, nor the respondent have observed the foregoing provision of law. Under the circumstances the decisions, to the extent this line of proof is a factor, are not in accordance with law. We summarize each in turn:

Realty Operators, Inc.: The respondent advanced no evidence along this line at all.

Wm. Henderson: A memorandum made in a sales memorandum book by a sales manager now deceased under date of June 8, 1934 reads:

> "6/8/34—11:23 A. M. Advance to $4.65 to cover sugar processing tax."

The Tax Court failed to make a finding made by the same person in the same book under date of November 23, 1934 (Henderson R. 154) reading:

> "11/23/34—Decline in Arkansas, Shreveport, Illinois and west of Mississippi River to $4.40 less 10¢ carload allowance, less 2% for cash. Prices so chaotic each sale is a matter of trading."

The Tax Court also found as a fact that between April 30, 1934 and June 1, 1934 prices declines 40 cents from $4.50 to $4.10 (Henderson R. 29).

We submit that in view of a finding of a decline of 40 cents immediately before the advance and evidence of "chaotic" prices within five months of the imposition of the tax a decision that the June 8th price rise was a passing on of the tax for the entire period the tax was in effect does violence to the law.

In nineteen transactions during the period June to November 1934 Henderson billed the tax separately. The tax so billed amounted to $1,639.19 and forms no part of the refund sought (Res. Br. 8-9). We think that when only $1,639.19 out of $1,138,421.82 is billed separately, it is

very evident that the billing of the tax in such few instances is an exception and that the taxpayer has met the requirements of Section 907(e)(2) set out above. The same reasoning applies to the single sales contract covering 1600 pounds (Res. Br. 9) out of 235,557,801 pounds produced during the tax period (Henderson R. 28).

We submit that the foregoing incidents advanced by the respondent as evidence of the passing on of the tax, does in fact establish the claim of the petitioner that excepting in these isolated instances the tax was absorbed.

L. M. Williams: The respondent makes much of a rubber stamped legend appearing on sales contracts, maintaining that such legend indicates an intention to pass the tax on. The said legend, in fact, is anticipatory and does not take into account existing taxes (Williams R. 182). The taxpayer had no unfilled contracts at the close of business June 7th (Williams R. 215). No further taxes were imposed after June 8, 1934. The legend, intended to protect the taxpayer against taxes imposed on existing contracts never became operative—therefore it proves nothing.

The respondent cites a number of letters to the Collector seeking postponement of the payment of the tax as permitted by law (Res. Br. 11-12). The language of such letters is careless; but, bearing in mind the purpose of the letter, it is not indicative of passing on the tax. The amount of processing tax due the Government was tied up in inventory—until such inventory was converted to cash no funds were available to pay the tax. Such is the natural and unstrained interpretation to be placed upon the letters —not a commitment to pass the tax on.

The letter to the Commissioner regarding the amount of claim (Res. Br. 13) is very clearly a mistake of fact. The full and true facts were stipulated (Williams R. 203) and the stipulation was before the Circuit Court pursuant to the order submitting the Exhibits in physical form (Williams R. 285). The stipulation shows that the said letter

did no more than establish the quantity to taxpaid unsold sugar on hand January 6, 1936, which the taxpayer was entitled to recover from the Government because the tax imposed was unconstitutional.

CONCLUSION.

We have gone to great pains to analyze the facts relied upon by the respondent—even though they are not pertinent to the petitions for writs of certiorari—in order that the Court may be advised of their irrelevancy. The facts upon which we rely for the purpose of demonstrating that the decisions are not in accordance with law are set forth in the respective petitions and briefs.

The fact remains that this Court in *Webre Steib Co. Ltd. v. Com.* construed the law in a manner different than that applied by the Tax Court. The Tax Court had lost jurisdiction by the time *Webre Steib* was decided and could do nothing about these cases—it did, however, in a subsequent sugar case hold unimportant the price rise of June 8, 1934, which, prior thereto in the cases at bar it had held controlling. The Circuit Court, instead of examining the evidence to determine whether the unconsidered facts were required to be weighed in the light of *Webre Steib,* affirmed on the *Dobson* rule of law.

Under the peculiar circumstances of the intervening decision by this Court in *Webre Steib* we do not think the *Dobson* rule applies, because any decision not in accord with the law pronounced by this Court, cannot be in accordance with law and is therefore reviewable.

Again we urge that the writs issue. Otherwise a grave miscarriage of justice will be perpetuated.

Respectfully submitted,

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CITATIONS

702109—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 187

REALTY OPERATORS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 188

WILLIAM HENDERSON (PARTNERSHIP), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 189

LAURENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, AND STERLING SUGARS SALES CORP., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Tax Court rendered unreported memorandum opinions in all three of these cases.[1] Its opinion in No. 187 appears at pages 40–43 of that record, in No. 188 at pages 25–34 of that record, and in No. 189 at pages 88–89 of that record.[2] The opinions of the Circuit Court of Appeals (Realty R. 127–129; Henderson R. 164–167; Williams R. 331–335) are reported, respectively, at 153 F. 2d 551, 153 F. 2d 442, and 153 F. 2d 547.

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 187 was entered February 18, 1946, and petition for rehearing denied March 15, 1946. (Realty R. 130, 147.) In No. 188 judgment was entered February 14, 1946, and petition for rehearing denied March 15, 1946. (Henderson R. 167, 184.) In No. 189 also, judgment was entered February 14, 1946, with petition for rehearing denied March 15, 1946. (Williams R.

[1] These three cases involve the same question of law and were consolidated below for presentation and decision. We deal with them here in like manner; this accords also with the taxpayers' wish. See the petitioner's brief in No. 187 at p. 10, in No. 188 at p. 10, and in No. 189 at p. 10.

[2] For convenience and clarity, we shall use herein the following record reference system: Realty R. —, Henderson R. —, Williams R. —.

336, 353.) The petitions for writs of certiorari were severally filed on June 14, 1946.

The jurisdiction of this Court is, in each instance, invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in any of these cases, the Tax Court erred in holding that the taxpayers, each claiming refund under Title VII of the Revenue Act of 1936 of processing tax payments, failed to establish that they bore the ultimate burden of the tax.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 20–26.

STATEMENT

All three of these petitioners were during the pertinent period processors of sugar operating in the State of Louisiana; and each of them paid at various times and in varying amounts processing taxes levied under the Agricultural Adjustment Act, subsequently invalidated in *United States* v. *Butler*, 297 U. S. 1. Pursuant to authority granted by Title VII of the Revenue Act of 1936, petitioners are seeking in these actions to recover those payments. Under Title VII, right of recovery depends upon proof by the claimant that it actually absorbed the processing tax and did not shift the tax burden to others; accordingly, the

issue is in each instance ultimately factual in character. In each of these cases the Tax Court made extensive findings of fact, and we refer the Court to those findings for detailed accounts of the evidence.[3] We set forth in this statement only those findings which directly substantiate the Tax Court's conclusions that none of the claimants bore the burden of the processing tax, and findings which are otherwise necessary to an understanding of the issue.

1. No. 187. Realty Operators, Inc. v. *Commissioner of Internal Revenue.*

Petitioner, as a first domestic "processor" of sugar w:'·'ıin the purview of the Agricultural Adjustment Act, paid a total of $241,791.81 in processing taxes. Its timely claim for refund, fined under Title VII of the Revenue Act of 1936, was disallowed in full. (R. 24–25.)

Petitioner's statutory "tax period" was the period commencing June 8, 1934, and ending October 31, 1935. Petitioner's statutory "period before and after the tax" was the 24 months immediately preceding June 8, 1934, to-wit, June 8, 1932, through June 7, 1934, and the six months February to July, inclusive, 1936. (R. 25.)

In its departmentalized system of accounts the petitioner charged its factories for cane from its own plantations at the current market price at time of processing for sugar cane of like grade and

[3] Realty R. 24–40; Henderson R. 25–34; Williams R. 80–88.

quality in the market where petitioner customarily bought its purchased cane; and in a sworn protest dated August 8, 1940, which was filed with the Commissioner before his disallowance of the claim for refund, the petitioner stated under oath that its accounting procedure with respect to the sugar cane processed was not based on actual cost but on the current market prices. The cost of the cane purchased by petitioner at market value plus the market value of petitioner's own-grown cane for the statutory period before and after the tax was $2,339,171.46 and $949,841.17 for the statutory tax period. (R. 29, 31.)

Petitioner's statutory gross sale value of all articles processed by it from sugar cane during the statutory tax period was $2,116,053.12. The petitioner's statutory gross sale value of all articles processed from sugar cane during the statutory period before and after the tax was $4,113,512.53. The petitioner's statutory units of commodity processed for the statutory period before and after the tax and the tax period, expressed in terms of pounds of 96 degree raw sugar, were 105,634,588 for the period before and after the tax and 49,021,406 for the tax period. The petitioner's statutory average margin by the unit pound of 96 degree raw sugar for the statutory tax period was $0.01885748 and for the statutory period before and after the tax was $0.01679671 by the unit pound of 96 degree raw sugar, provided cost be

based on the market value of petitioner's own home-grown cane. (R. 31–32.)

The petitioner's statutory average margin by the unit pound of 96 degree raw sugar for the statutory tax period was $0.00206077 in excess of its statutory average margin (by the unit pounds of 96 degree raw sugar) for the statutory period before and after the tax, if the same basis of cost is used. But if the actual cost be used, the average margin for the base period would be $0.018098; for the tax period, $0.016958; and the average margin for the tax period lower by $0.001140 than for the base period. (R. 32.)

On June 8, 1934, the effective date of the tax on the processing of sugar, the price of refined sugar was increased by the claimant and the entire sugar industry by 55 cents for every one hundred pounds. The tax was at the rate of $0.535 by the hundred pounds of refined sugar. A two percent discount was allowed on all sales, making a net price increase of $0.539 by the 100 pounds. At this time, petitioner had no sugar on hand, the 1933 crop having been sold, and the 1934 crop not yet ready for harvest. (R. 32.)

The petitioner's cost of production, *i. e.,* its cost of manufacturing the articles produced from the commodity processed, by the unit pounds of 96 degrees raw sugar, was greater in the tax period than in the period before and after the tax by $0.000553 per unit. Its increased selling ex-

pense was $0.00054; and its depreciation and general expense was $0.002794; with a resulting total increase of cost of $0.003887. (R. 32.)

During the period two years before the tax the quota system was not in effect. During the period six months after the tax the quota system continued in effect although there was no processing tax. The control of supply and demand by means of the quota system made it possible for the sugar industry to make some increase in the price of sugar on and after June 8, 1934. (R. 40.)

Petitioner made no refunds of processing taxes to any of its vendees on sugar sold or delivered prior to January 6, 1936. There is no agreement or understanding, written or oral, whereby the petitioner, or anyone whom the petitioner directly or indirectly controls, or anyone by whom the petitioner is directly or indirectly controlled, may be relieved of or reimbursed for, or may shift, the burden of the tax. (R. 30.)

The Tax Court held (R. 42) that the petitioner had not borne the burden of the tax and sustained the Commissioner's denial of refund. The Circuit Court of Appeals affirmed.

2. No. 188. William Henderson (Partnership) v. *Commissioner of Internal Revenue.*

This petitioner, as a first domestic "processor" of sugar within the meaning of the Agricultural Adjustment Act, paid a total of $1,138,421.82 in

processing taxes. Its timely claim for refund, filed under Title VII of the Revenue Act of 1936, was also disallowed in full. (R. 26.)

The petitioner's statutory "tax period" for the purpose of the processing tax began June 8, 1934, and ended October 31, 1935. Its statutory margin was \$ .00922898 for the tax period and \$ .00872695 for the base period. The statutory margin for the tax period therefore exceeded the margin for the base period by \$ .00050203. (R. 27–28.)

The quota system limiting the importation of raw sugar, which went into effect as a part of the Jones-Costigan Act on June 8, 1934, resulted in a direct increase in the price of raw sugar. (R. 30.)

At the time the processing tax went into effect the sale price of refined sugar was advanced throughout the sugar industry by approximately the amount of the tax. In a sales memorandum book kept by the petitioner's now deceased sales manager, the following notation was made as of June 8, 1934: "6/8/34—11:23 A. M. Advance to \$4.65 to cover sugar process tax." The processing tax rate was 55¢ per cwt. The June 7 sale price was \$4.10. (R. 30–31.)

After the imposition of the processing tax the petitioner billed some of its customers for the tax on sales of sugar, syrup, and molasses as a separate item. There were 19 such transactions over the period from June 8 to November 3, 1934, in which the processing taxes aggregated \$1,639.19. The

petitioner concedes that this amount of the taxes represented by its claim, in the total amount of $1,138,421.82, was passed on to its vendees and is not recoverable. (R. 31.)

A sales contract which the petitioner executed with one of its customers in Chicago on July 22, 1935, confirming the sale of 1,600 pounds of sugar at $4.90 f. o. b. New Orleans less "10¢ per Cwt. special allowance," carried the following typed-in provision (R. 31):

> It is mutually understood that the basic price includes processing tax of 53.5 per Cwt. which is to be credited to buyer's account if refunded to or withheld by seller due to tax being illegally assessed.

The Tax Court sustained the Commissioner's denial of the refund, finding on the evidence that the taxpayer did not bear the burden of all or any ascertainable portion of the processing tax which it sought to recover. (R. 33.) The Circuit Court of Appeals affirmed.

3. No. 189. Laurence M. Williams, as Liquidator of Sterling Sugars, Inc., formerly a Louisiana Corporation, and Sterling Sugars Sales Corp. v. *Commissioner of Internal Revenue.*

The corporation in this case, as a first domestic "processor" of sugar within the meaning of the Agricultural Adjustment Act, paid a total of $652,503.50 in processing taxes. Timely claim for refund was denied in full. (R. 85.)

The statutory "tax period" of this processor is the period commencing June 8, 1934, and ending October 31, 1935, inclusive; the period for the computation of margins before and after the tax period is the period June 8, 1932, to June 7, 1934, inclusive, and the period from February 1, 1936, to July 31, 1936, inclusive. (R. 83.) The average margin per unit of the commodity processed during the tax period was \$.01022; the average margin per unit of the commodity processed during the period before and after the tax was \$.00899. (R. 83–84.)

Prior to June 8, 1934, the date of the imposition of the processing tax on sugar, the corporation revised its contract forms covering its sales of sugar to include a clause providing that in the event the tax was imposed, the price of all sugar at that time undelivered should be increased by 107½ percent of the amount of such tax if computed upon a poundage basis and, if not determinable on the basis of poundage, then the price should be increased by the amount by which the seller's cost per pound of refined sugar thereafter delivered would be increased by reason of such tax. This tax clause continued in use on both contracts and invoices of the corporation through the tax period. The processor notified its various sales agents to explain to their customers that all purchases of sugar made from it after June 8, 1934, would carry the tax to be imposed that day. (R. 86.)

The processing tax on sugar at the rate of 53½ cents per 100 pounds of refined sugar was made effective June 8, 1934, and on all the markets for sugar the selling price was immediately, on that day, increased by 55 cents per 100 pounds. This increase was because of the imposition on that date of the processing tax, and, when the customary trade discount of two percent had been allowed on the invoice price, permitted a tax recoupment slightly in excess of the amount of the tax. This corporation, together with other producers of sugar, increased on this date its prices to customers by the amount of 55 cents per 100 pounds and the fluctuation of sugar prices on the market after that date was from the higher level thus set. (R. 86–87.)

On August 8, 1934, the corporation, through its assistant general manager, wrote a letter to the Acting Collector of Internal Revenue at New Orleans, Louisiana, which stated as follows (R. 87):

> We have previously reported our production of sugar during the period of June 8th–July 7th, inclusive. You will find enclosed herewith our report of production from the first moment of July 8th to date.
>
> As was necessary on our other reports we request that we be allowed to withhold payment of processing tax for the full limit of the law, i. e., 180 days, unless the sugar is sold and the tax collected prior to that time.

> **We haven't the necessary funds to advance this money to our Government and can only pay this tax when it has been collected from our customers.**

In another letter addressed to the Acting Collector under date of September 27, 1934, by the corporation, the following statement was made (R. 87):

> Should your Washington office demand payment to you each month as processing is reported we would be in the position of advancing money to our Government which had not as yet been collected for their account and would impose upon us an undue hardship.

On August 31, 1936, Sterling Sugars Sales Corporation, as agent for Sterling Sugars, Inc., instructed one of its sales agents in the field to advise customers, who requested credit upon invoice prices of the amount of the tax, that it had no responsibility to them to refund the tax which they had paid by its inclusion in the price charged since the amount of the tax thus paid had been remitted by Sterling Sugars, Inc., to the Government, but that if such customers could show that they had not, in reselling the sugar, passed on the amount of this tax to the customers, they should file claim with the Federal Government for its refund. (R. 87–88.)

On February 19, 1936, Sterling Sugars, Inc., through its treasurer and assistant general man-

ager, advised the Journal of Commerce and Commercial of New York that it was issuing affidavits to its customers in order that they might file claims for refund of processing taxes paid by it with respect to sugar purchased by them. (R. 88.)

In a letter to the Commissioner dated January 12, 1938, and following the filing of its "tentative return" claiming refund in the amount of $652,-503.50, the processor stated (R. 84–85):

> The schedules enclosed show that the total Processing Tax paid on production was $652,503.50 and that the Processing Tax collected was $651,825.27, leaving a balance of $678.23 Processing Tax paid which was not collected from customers. Although our Claim on Form 79 No. F–1441 was in the amount of $652,503.50, the schedules reveal that the actual amount to be refunded under the claim is only $678.23.
>
> If additional statements are required, won't you kindly so advise us and at the same time grant us an extension of ninety days within which to compile and forward the statements desired.

The Tax Court found (R. 88) that no part of the burden of the amount paid or collected as processing tax for the tax period on its processing of sugar was borne by the corporation, but such burden was shifted to its customers entirely. The Circuit Court of Appeals affirmed.

ARGUMENT

These cases do not warrant further review. They were correctly decided below upon well-established principles of law, and no conflict among the circuits is presented.

There is no merit to petitioners' primary contention that the decisions below conflict with *Webre Steib Co.* v. *Commissioner,* 324 U. S. 164, in that this Court declared in that case (p. 174) that the evidence of universal price increase did not conclusively demonstrate that the claimant there had shifted the tax. In *Webre Steib* the Court was confronted with computations which disclosed a lower margin during the tax period and therefore gave rise under Section 907 of the Revenue Act of 1936 (Appendix, *infra,* pp. 21–26) to a presumption in the taxpayer's favor that it had absorbed a part of the processing tax; whereas in all three of the cases at bar, the margin was higher during the tax period, and this fact gave rise under the statute to a presumption in the Government's favor that all of the tax had been shifted.[4] Since the Court was only concerned in

[4] The Tax Court expressly so found in the *Henderson* and *Williams* cases. (Henderson R. 31, Williams 84.) In the *Realty* case the Tax Court did assume *arguendo* (Realty R. 42) a margin favorable to the taxpayer, but we think it clear that the assumption was fallacious as a matter of law. The statutory computation formula found in Section 907 provides for determining "cost of commodity" by use of either actual

Webre Steib with the value to be given price increase evidence when directed toward rebuttal of the presumed absorption established there under Section 907, or when viewed, after elimination of the statutory presumption, merely as evidence negativing any permissive inference of absorption raised by the lower tax period margin there, the decisions below are clearly not contrary to anything appearing on the point in the *Webre Steib* opinion.[5]

Moreover, unlike *Webre Steib,* where the Tax Court's decision was erroneously based upon the presumption created under Section 907 in the face of countervailing evidence of shift, the statutory presumption was not the foundation for any of the Tax Court decisions with which we here are concerned. All of the instant decisions were based upon the evidence, considered without reference

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cost or of market value, depending upon which of the two is employed by the claimant in his accounting procedure. It was conceded below in both courts that use of market value in the *Realty* results in a margin unfavorable to that taxpayer; and Part II of *Realty* Petitioner's Exhibit 13, pp. 8–9 (not included in the printed record, but filed in the Circuit Court of Appeals in original form under order of that Court, Realty R. 120–121), is an admission to the Commissioner by the *Realty* claimant that its accounting procedure was based on market value rather than on actual cost.

[5] Indeed, this Court specifically declined there to express any opinion at all with reference to operation of the Section 907 presumption or its overthrow in a situation where, as here, it favors the Government. See 324 U. S. at 171.

to Section 907.[6] Thus, as regards the *Williams* and *Henderson* cases, the Tax Court *arguendo* assumed, in ultimate effect, that the taxpayers had successfully rebutted the presumption favorable to the Government which had been theretofore raised in those cases by the margin comparisons; conversely, in the *Realty* case the Tax Court assumed that the presumption which it had previously assumed to operate in favor of the taxpayer had been dispelled by the Government.[7] It then

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[6] Thus, in the *Henderson case*, the Tax Court stated (Henderson R. 33):

> Excluding all consideration of the effect of the statutory presumption the evidence of record, we think, would require us to rule that the petitioner did not bear the burden of all or any ascertainable portion of the processing taxes which it seeks to recover.

In the *Williams* opinion, the Tax Court stated (Williams R. 89):

> We think it clear from the evidence that this presumption not only has not been overcome but, on the other hand, the facts indicate that this claimant absorbed none of the tax but passed this burden on to its customers.

And in the *Realty* case, the Tax Court said (Realty R. 41):

> If we consider the instant case without resort to statutory presumptions in order to determine whether petitioner bore the burden of the tax or passed it on to its vendees * * * we should * * * conclude * * * that petitioner shifted the burden of the tax * * *.

[7] Obviously, the *Henderson* and *Williams* petitioners have nothing about which to complain in respect to this "ruling", for it worked to their interests. And the assumption of overthrow which was made in the *Realty* case finds ample substantiation in the Government's evidence of universal coincident price increase in the sugar industry—precisely the kind of evidence which this Court said in the

proceeded to survey the evidence "as if there had never been a presumption." *Webre Steib Co.* v. *Commissioner,* 324 U. S. at 171.

Actually, it is the petitioners' own position rather than that of the Government which runs counter to *Webre Steib* doctrine; for claimants' proposition is in reality that their evidence not only overcame the presumption of shift arising from the statutory margin comparisons, but that it served also to raise in their favor a new or counter-presumption of absorption. Such an argument cannot be reconciled with this Court's declaration in the *Webre Steib* case, 324 U. S. at 170–171, that once the presumption created under Section 907 is dissipated, the case is to be judged upon all of the evidence *pro* and *con*—without benefit of compelled inference in favor of either party. And with the statutory presumption eliminated, a Title VII cause is no different and calls for application of no different tenets of law than is applicable ordinarily to factual issues; that is the second major rule of the *Webre Steib* case, and it was certainly heeded here by the court below. In accordance with such cases as *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231, and *Commissioner* v. *Scottish American Co.,* 323 U. S. 119, the Circuit Court of

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Webre Steib case, 324 U. S. at 172, *would* suffice to overcome the presumption, whatever its value when considered merely as evidence negativing absorption, absent any presumption.

Appeals declined in the cases at bar to reweigh the evidence or to substitute its own inferences for those of the Tax Court. It properly inquired only whether there was substantial evidence in the respective records to sustain the Tax Court's determination that the claimants, upon whom Section 902 (Appendix, *infra*, pp. 20–21) specifically rested the burden of proof, had not borne the burden of the processing tax.

It seems clear, as the court below held, that the supporting evidence in these cases was more than substantial. We have heretofore mentioned the fact of the sugar industry's universal price increase, which coincided in time and amount with the processing tax.[8] Moreover, and contrary to petitioners' charge here that this was the sole evidence of shift upon which the Tax Court decisions are rested, there was before the Tax Court such affirmative evidence of shift as, for example in the *Henderson* and *Williams* cases, the fact that those petitioners executed sales contracts which reflected inclusion of the processing tax in the price of the product.[9] The *Williams* petitioner once admitted to the Commissioner that no basis existed for its present claim to refund.[10] And perhaps of most consequence is the fact that, under *Webre Steib* doctrine, the statutory margin comparisons here

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[8] Williams R. 86–87; Realty R. 32; Henderson R. 30.

[9] Henderson R. 31; Williams R. 86.

[10] Williams R. 84.

were "evidence" of shift, without regard to their possible "presumptive" effect. Indeed, as this Court said in its *Webre Steib* opinion, the margin comparisons were in themselves "substantial" evidence—they would have supported the Tax Court's determination of shift in these cases even had they stood unaided by any other proof of the ultimate fact. *Webre Steib Co.* v. *Commissioner,* 324 U. S. 164, 174.

CONCLUSION

The petitions for certiorari should each be denied.

Respectfully submitted.

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Special Assistants to the Attorney General.

July, 1946.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—*Refunds of Amounts Collected Under the Agricultural Adjustment Act*

*   *   *   *   *

SEC. 902. *Conditions on allowance of refunds.*

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2)

through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C. 644.)

Sec. 907. *Evidence and presumptions*

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of

months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period Before and After the Tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

* * * * *

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting proce-

dure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfac-

tory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

* * * * *

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the

changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the

average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

(7 U. S. C. 649.)

U. S. GOVERNMENT PRINTING OFFICE: 1940

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 187.

REALTY OPERATORS, INC., *Petitioner*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

No. 188.

WILLIAM HENDERSON (PARTNERSHIP), *Petitioner*,
v.
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No. 189.

LAURENCE M. WILLIAMS, as LIQUIDATOR OF STERLING SUGARS, INC., formerly a LOUISIANA CORPORATION, and STERLING SUGARS SALES CORP., *Petitioners*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR RECONSIDERATION OF DENIAL OF WRITS OF CERTIORARI—OCTOBER 14, 1946.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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LIST OF AUTHORITIES CITED.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR RECONSIDERATION OF DENIAL OF WRITS OF CERTIORARI—OCTOBER 14, 1946.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Court denied the petitioners' applications for writs of certiorari to the Fifth Circuit Court of Appeals on October 14th. We respectfully request the Court to reconsider its decision not to grant the writs for the reason that unless this Court does grant the writs, your petitioners will be

denied the justice obtained by numerous other sugar processors. There is

No Question of Law to be Decided.

—only an opportunity to have the Tax Court apply the law as expounded by this Court in *Webre Steib Co., Ltd.* v. *Com.* (324 U. S. 164)—because the Tax Court decided the instant cases before this Court construed the applicable law. Nor is the *Dobson* rule of law at issue because it certainly can have no application where, as here, the Tax Court acted on a theory since rejected by this Court in the *Webre Steib* (supra) case. The same exercise of discretion that prompted this Court to hear and remand to the Tax Court the *Webre Steib* (supra) case, requires that the cases at bar be remanded—because

The Basic Facts in the Instant Cases are on All-Fours with the Webre Steib Case.

in almost every particular—to the extent that even the seasonal operation exists in *Realty Operators, Inc.* (No. 187). They involve the same sugar industry, are located in the same state, serve the same market, and are governed by the same general set of facts—especially the price advance of June 8, 1934.

Since this Court construed the statute,

The Tax Court Has Followed the Webre Steib Case and as a Result Thereof a Number of Other Sugar Cases Have Been Settled.

In *South Coast Corporation,* another sugar case, (T. C. Memo Decision Docket No. 2165, decided June 11, 1945) the Tax Court followed the rule laid down by this Court and held the June 8, 1934 price rise not controlling, stating:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

Those are the words of Judge Leech after this Court spoke; whereas before this Court spoke, Judge Leech in respect to one of your petitioners said:

> "The Processing Corporation, together with other producers of sugar, increased on this date its prices to customers by the amount of 55 cents per 100 pounds *and the fluctuation of sugar prices on the market after that date was from the higher level thus set.*" (Italics supplied) (Williams No. 189, Record 87)

Counsel in the cases at bar—since the *Webre Steib* decision—has settled six sugar processing and unjust enrichment tax cases pending before the Tax Court, namely Docket Nos. 108,029; 111,018; 111,050; 109,622; 110,073 and 424 PT; and, previously the *Insular Sugar Ref. Co.* (141 Fed. 2d 713) was awarded a refund by the U. S. Court of Appeals for the District of Columbia.

Therefore your petitioners are in the unique position of being the sole sugar processors denied

Equal Justice Under Law.

unless this Court grants certiorari and remands the cases to the Tax Court. We appeal to this Court not to permit the rights of your petitioners to lapse without giving the Tax Court the opportunity to apply the law as it was later construed.

There is no law to be briefed, argued and decided—all of that has been done. All that is needed is a remand to the Tax Court so that it may apply the decided law.

Authorities.

Somewhat analogous situations have arisen before this Court in the past, and it has given relief where an intervening event has caused the judgment of the lower court to be in error. Here the decision of this Court in *Webre steib Co., Ltd.* v. *Com.* (supra) construing the processing tax refund statute is an intervening event that requires correction of the Tax Court's theory of the law of the case.

In *Watts, Watts & Co. Ltd.* v. *Unione Austriaca di Navigazione* (248 U. S. 9) in an opinion by Mr. Justice Brandeis this Court reversed a lower court because of an intervening proclamation by the President declaring a state of war, and said:

> "And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below."

In *Butler* v. *Eaton* (141 U. S. 240) this Court reversed a judgment that was correct when rendered, but became incorect by a subsequent decision of this Court in a related matter. In *William Crozier* v. *Fried. Krupp Aktiengesellschaft* (224 U. S. 290) an intervening Act of Congress caused this Court to reverse a lower court that had correctly decided an issue before the legislation was passed.

In *Gulf, Colorado & Santa Fe Railway Company* v. *W. R. Dennis* (224 U. S. 503, 32 S. Ct. 542), this Court reversed a lower court, stating: (32 S. Ct. 544)

> "The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done."

As recently as 1940, in an opinion by Chief Justice Hughes, in *Carpenter* v. *Wabash Ry. Co.* (309 U. S. 23, 27), the Court reaffirmed the rule stated by Chief Justice Marshall in *U. S.* v. *Schooner Peggy* (1 Cranch 103, 110):

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

On February 1, 1943, in an opinion by Mr. Justice Reed in *Ziffrin, Inc.* v. *U. S.* (318 U. S. 73), this Court said: (page 78)

> "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law."

The decisions of the Tax Court, in the cases at bar, were correct when rendered only in the sense that there was no higher authority existing on that date. This Court's subsequent decision in Webre-Steib (*supra*) made those decisions wrong.

THEREFORE, it is prayed that this Court will reconsider the petitions for certiorari; grant the writs and order the cases remanded to the Tax Court with instructions to weigh the evidence and arrive at conclusions of law consistent with the law expounded in *Webre Steib Co., Ltd.* v. *Com.* (supra).

Respectfully submitted,

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CARL J. BATTER, a member of the bar of this Court, certifies that the preceding petition for reconsideration is made in good faith and not for delay, and in the sincere conviction that the ends of justice will be best served if the writs are granted.

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